No. 11471

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETE GARCIA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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To the Honorable Ninth Circuit Court of Appeals of the United States of America:

This is an appeal from the District Court of the United States, Southern District of California, Central Division, of a conviction of the appellant in two counts of an information charging the defendant with violation of the Selective Training and Service Act of 1940, and certain regulations allegedly issued pursuant thereto.

Jurisdiction.

Jurisdiction is conferred by Title 50, App. Sec. 311. The appellant was charged against by the Grand Jury on the 21st day of August, 1946, charging him with two counts of violation of the Selective Training and Service Act of 1940, as amended (U. S. C., Tit. 50, App., Sec. 311).

Judgment was pronounced against the defendant on Counts I and II, on the 31st day of October, 1946, by the Honorable Judge Ben Harrison. Notice of appeal was duly and regularly filed on the 8th day of November, 1946.

The Conviction was under the following counts:

Count I, which charged that the appellant, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 199, said board then and there being duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 9, 1942, at Los Angeles, County, California, in the division and district aforesaid; on or about November 9, 1942, and at all times thereafter until on or about July 14, 1946, the defendant did knowingly fail and neglect to perform a duty required of him under said act and regulations promulgated thereunder, in that he did knowingly fail and neglect to report for induction into the armed forces of the United States as so notified and ordered to do.

Count II, is a copy in every detail of Count 1, except that the concluding language, charged that the appellant, on or about November 9, 1942, in violation of the provisions of said Selective Training and Service Act of

1940, did knowingly and unlawfully evade service in the land or naval forces of the United States of America, in that he did knowingly and unlawfully depart from the United States of America, and go to a foreign country, to-wit, the Republic of Mexico, for the purpose of evading service in the land or naval forces of the United States, and did there remain until on or about July 14, 1946.

Short Statement of Facts.

The appellant, Pete Garcia Cervantes, was charged by the grand jury with the offense of violation of the Selective Service and Training Act of 1940, in that he did knowingly fail and neglect to report for induction into the armed forces of the United States, as more fully set forth in Count 1 of the Indictment, and that he did knowingly and unlawfully depart from the United States and go to a foreign country,— the Republic of Mexico, for the purpose of evading service in the land or naval forces of the United States, and did there remain until on or about July 14, 1946, as more fully set forth in Count 2 of said Indictment.

Pete Garcia Cervantes, the appellant, was born August 12, 1919, at La Barca, Mexico, and brought to the United States by his parents in 1923. [R. 87.] He never returned to Mexico until October 30, 1942. He lived in the United States from 1923 until October 30, 1942, in Los Angeles, California, and attended Utah Street Grade School, Hollenbeck Junior High School and Frank Wiggins Trade School until he was 18 years old, when he commenced working. He worked for several years for Swift and Company, and other concerns. He is married

to an American citizen, and has three children, born in Los Angeles, California.

He registered under the Selective Training and Service Act in Los Angeles, on October 16, 1940, at Local Draft Board No. 199, in Los Angeles. In the Questionnaire submitted to him [Government's Ex. 5] he swore that he was born in La Barca, Mexico, on August 12, 1919, that he was a citizen of the Republic of Mexico, *that he had not declared his intention to become a citizen of the United States*, that his alien registration number was 3222154, and that he had not filed a petition for naturalization. Appellant testified that he signed and swore to the questionnaire before one Nathan Klein, at Local Draft Board No. 199 [R. 99], but that nobody informed him of the law, or the facts, pertaining to his alien citizenship, in relation to the Draft Law, nor did he have any knowledge of his status at such time, or thereafter. [R. 99, 100.]

Thereafter, Cervantes received an order to report for induction on November 9, 1942. [Government's Ex. 6.] On October 30, 1942, Cervantes was persuaded by his uncle to depart for Mexico, and he and his brother crossed the border at San Ysidro, California, on said date, arriving at Tia Juana, Mexico. Three weeks later, he went to Guadalajara, Mexico, and volunteered for service in the Mexican Army. [R. 110, and Deft. Ex. F.] He remained in Guadalajara for a period of eight months waiting to be called into the Mexican Army [R. 109], and then returned to Tia Juana, where he remained until July 14, 1946. He testified that he made repeated efforts to return to the United States during his stay in Tia Juana, and that he went to various officials, both

Mexican and American, expressing his desire to return to the United States and enter the armed forces of the United States. [R. 52, 60, 61, 114, 123, 127, 148, 149.] He signed an application for a visa, non-quota, from the American Foreign Service at Tia Juana [Deft. Ex. B], but his application was rejected. About April, 1945, Eugene Cordeau, Sr., a member of the Selective Service Board No. 165, at National City, California, hearing about his problem, offered to aid him in returning to the United States, and enter the American Army, and in pursuance of said efforts, wrote letters to Colonel H. K. Leach, State Director of Selective Service in California, who, in turn, forwarded said letters to Local Board No. 199. [Government's Ex. 11, 13.] Cervantes also wrote a letter to Local Board No. 199, enclosing a letter from Eugene Cordeau, Sr. [Government's Ex. 12.] Failing to find assistance in his efforts, he came into the United States on July 14, 1946, and surrendered forthwith to the agents of the F.B.I. [R. 128.]

Questions Raised by This Appeal.

1. Did the trial court err in failing to instruct the jury on the statutes and regulations of the offenses for which the defendant was being tried?

2. Whether the Court committed reversible error in its various rulings during the case.

3. Whether the Court committed reversible error in giving certain instructions, and refusing to give others to the jury.

4. Is the evidence sufficient to support the conviction of appellant?

5. Was the defendant denied due process of law?

Specification of Error No. 1.

The trial court erred in failing to instruct the jury on all of the statutes and regulations applicable to the offenses for which the defendant was being tried.

Specification of Error No. 2.

The Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time, and in the manner, prescribed by law, duly excepted.

"Defendant's Proposed Instruction No. 5. [R. 10.]

You are instructed that every alien between the ages of 21 and 26 who lives or has a place of residence or abode in the United States, temporary, or otherwise, or for whatever purposes taken or established, is required to present himself for and submit to registration *unless such alien falls within one of the specific classes exempted* from such registration—"

Specification of Error No. 3.

The Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 6. [R. 11.]

You are instructed that the rules and regulations made by the director of the Selective Training and Service Act of 1940 do not provide any norm or standard by which the local board can determine whether or not a person

is in one of the "other Categories" mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Sect. 305, nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not residing in the United States, as that term is used in Section 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

Specification of Error No. 4.

The Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 7. [R. 11.]

You are instructed that a male alien who is now in or hereafter enters the United States, who has not declared his intention to become a citizen of the United States, is not a "Male person residing in the United States," within the meaning of Section 2 or Section 3 of the Selective Training and Service Act of 1940 as amended.

Specification of Error No. 5.

That the Court in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 8. [R. 12.]

You are further instructed that due process has been denied where there is no rule promulgated in the regulations whereby any standards are established for any

person who is subject to the Selective Training and Service Act to determine whether or not he is or is not entitled to a certificate of non-residence.

Specification of Error No. 6.

That the Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 9. [R. 12.]

You are instructed that by treaty dated January 22, 1943, between the United States of America and the Government of Mexico, the nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence.

Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter, and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objections desired.

Specification of Error No. 7.

That the Court erred in refusing to give the following instructions proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 15. [R. 14.]

(a) If a delinquent reports or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted or assigned to work of national importance, as the case may be, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to report for Induction (Form 150) or an Order to Report for Work of National Importance, (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to work of national importance, and the local board to which the registrant has reported, or before which he has been brought shall prepare such papers as may be necessary in order to effect such induction or assignment and forward copies thereof to the registrant's own local board. The induction or assignment of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for delivery to the local board from which such registrant was inducted or assigned.

(c) If the registrant's own local board advised that an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance

(Form 50) has not been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared or has been brought of the action to be taken with reference to such registrant.

Specification of Error No. 8.

That the Court erred in refusing to allow a written offer of proof to be admitted in evidence, of the testimony of Eugene Cordeau, Sr., a material witness and to be submitted to the jury.

The ruling was made as follows [R. 175]:

> "Miss Zacsek: At this time we will call Jean Cordeau, may it please the court. As far as we are advised, there is no response because Mr. Cordeau is ill. We deem him a material witness. He has been duly served with a subpoena and we ask a bench warrant be issued for his appearance.
>
> The Court: Counsel, you have filed a statement as to what you expect to prove by him.
>
> Miss Zacsek: Yes.
>
> The Court: I told you yesterday morning I would issue a bench warrant for the witness, but if we were to do so now it would simply mean a continuance of this case. You have filed a statement as to what you expect him to testify to?
>
> Miss Zacsek: Yes.
>
> The Court: And the Court will direct that that statement be filed because if he were here the Court would not permit him to so testify on the ground it would be incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

ARGUMENT.

I.

The Court Erred in Refusing to Instruct the Jury on All of the Statutes and Regulations Applicable to the Offenses For Which the Defendant Was Being Tried.

SPECIFICATIONS OF ERROR.

Specifications of Error 1, 2, 3, 4, and 5 will be considered together.

The Court erred in refusing to give the following instructions proposed and offered by the defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 5.

You are instructed that every alien between the ages of 21 and 36 who lives or has a place of residence or abode in the United States, temporary, or otherwise, or for whatever purposes taken or established, is required to present himself for and submit to registration *unless such alien falls within one of the specific classes exempted* from such registration by Section 5(a) of the Selective Training and Service Act of 1940.

Defendant's Proposed Instruction No. 6.

You are instructed that the rules and regulations made by the director of the Selective Training and Service Act of 1940 do not provide any norm or standard by which the local board can determine whether or not a person is in one of the "other Categories" mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Section 305, nor do they provide a norm or standard by which if

certain facts are present it can determine whether or not a person is or is not residing in the United States, as that term is used in Sections 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

Defendant's Proposed Instruction No. 7.

You are instructed that a male alien who is now in or hereafter enters the United States, who has not declared his intention to become a citizen of the United States, is not a "male person residing in the United States," within the mean of Section 2 or Section 3 of the Selective Training and Service Act of 1940 as amended.

Defendant's Proposed Instruction No. 8.

You are further instructed that due process has been denied where there is no rule promulgated in the regulations whereby any standards are established for any person who is subject to the Selective Training and Service Act to determine whether or not he is or is not entitled to a certificate of nonresidence.

In 39 Op. A. G. 505, October 11, 1940, the Attorney General of the United States rendered the following opinion in connection with an interpretative ruling upon the meaning of the words "male alien residing in the United States" under Section 2 of the Selective Training and Service Act of 1940:

> "Reading the above-quoted provisions of the Act together, it is my opinion that Section 2 requires every alien between the ages of 21 and 36 who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established, to present himself for

and submit to registration, *unless such alien falls within one of the specific classes exempted from such registration by Section 5(a).* Whether any particular alien who fails so to register will thereby render himself amenable to the penal provisions of the statute will depend upon the facts in his individual case."

Section 305(a) of the Selective Training and Service Act, Title 50 App., provides that:

"* * * diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice consuls *and persons in other categories*, to be specified by the President, residing in the United States, *who are not citizens of the United States, and who have not declared their intention to become citizens of the United States,* shall not be required to be registered under Section 2 (Section 302 of this Appendix) *and shall be relieved from liability* for training and service under Section 3(b) (Section 303(b) of this Appendix)."

In *Ex parte Asit Ranjan Ghosh,* 58 Fed. Supp. 851, the Court is quoted as follows:

"I believe that the power existed under Section 5 of the Act for the President to establish "categories of people" who would be non-residents. But the President delegated his power to the Director of Selective Service in that connection. The Director of Selective Service did not, either in his own name, or in the name of the President, specify

or establish any categories other than those that, in the Act, are designated with particularity.

I think he has simply, under the regulations as they now stand, reserved to himself the power personally to determine—by what rules no one would know—the petitioner, or any other person who sought a certificate of exemption,— whether he was or was not entitled to it.

That, in my judgment, is what is described in the decisions as arbitrary and capricious, and I would say lack of due process, and a lack of rule of reason.

I do not think the rules and regulations provide any norm or standard by which the local board can determine whether or not a person is in one of the 'other categories' mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Sect. 305, nor do they provide a norm or standard by which, if the facts are present, it can determine whether or not a person is or is not 'residing in the United States' as that term is used in Sections 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

It seems to me due process has also been denied the petitioner, because there is no rule promulgated in the regulation whereby any standards are established for any person who is subject to the Act to determine whether or not he is or is not entitled to a certificate of non-residence."

Appellant was a Mexican National, who was not a citizen of the United States and had not declared his in-

tention to become a citizen of the United States. He held an alien registration card and had not filed a petition for naturalization. All of these facts were submitted under oath to his local draft board. [R. 99, 100.]

It is the contention of appellant that he was denied due process of law in the following particulars, to-wit:

1. That he was not notified or advised by his local draft board as to his alien status under the existing statutes and regulations of the Selective Training and Service Act, and that he had a right to claim exemption from the draft.

2. That his local draft board had erroneously classified him as 1-A.

3. That the appellant was a male alien who was not required to submit to registration, in that he came within one of the specific classes exempted from such registration by Section 5(a).

4. That it was the duty of his local draft board to grant him a certificate of exemption, or a certificate of non-residence.

Having, nevertheless, registered, appellant was denied knowledge of the existence of "Alien's Application for Determination of residence (Form 302)," together with an "Alien's Personal History and Statement (Form 304)": that he had no knowledge of the existence of said applications, or of the forms, and no one advised him of the existence of same, nor were such forms available

to him, nor did the members of his board, or either of them, at any time, or at all, give to him the benefit of what undoubtedly was their superior knowledge, either directly or indirectly. [R. 99, 100.]

In *United States v. Cain,* 149 F. (2d) 338, is found the following opinion:

> "Induction in the Army must indeed be by summary procedure, but we have a number of times decided that when it appears that a local board has denied to registrants the protection which the Statute and the regulations afford them, we must intervene. (Citing) United States v. Kanten, 2 Cir. 133 F. (2d) 703; United States ex. rel. Phillips v. Downer, 2 Cir. 135 F. (2d) 521; United States ex. rel Reel v. Badt, 2 Cir., 141 F. (2d) 845; United States ex. rel Beye v. Downer, 2 Cir. 143 F. (2d) 125. The same assumption underlies our decisions in United States ex. rel. Brandon v. Downer, 2 Cir. 139 F. (2d) 761; United States ex. rel. La-Chanty v. Commanding Officer, 2 Cir. 142 F. (2d) 381; and United States ex. rel. Trainin v. Cain (2 Cir., 144 F. (2d) 944)."

The provisions in Selective Service Act that decisions of Selective Service Board shall be final, narrowly limits the scope of judicial examination of board's actions, but Congress did not intend by the use of such words to deny any registrant constitutional protection of due process of law.

United States v. Cain, 144 F. (2d) 944.

II.

The Court Erred in Refusing to Instruct the Jury on the Matter of the Treaty Between the United States of America and the Government of Mexico, as Embodied in Defendant's Proposed Instruction No. 9.

Specification of Error No. 6.

On January 22, 1943, the Government of Mexico, and the United States of America, entered into a treaty relating to military service of the nationals of either country residing in the other country. 57 U. S. Statutes at Large, 975, 78th Congress, 1st Session, 1943.

> "IX. Nationals of each country who have been registered for, or inducted into, the Army of the other country in accordance with the military service laws of the latter, and who have not declared their intention to acquire the citizenship of the country in which they reside, shall upon being designated by the country of which they are nationals, and with their consent, be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of those persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired."

Appellant's testimony was as follows [R. 110]:

> Q. By Miss Zacsek: Now, when you went to Guadalajara, did you do anything about the Mexican Army? A. We volunteered in the Mexican Army.
>
> Q. If you do not speak up I cannot hear you across the room and I am certain I couldn't hear any

of the conversation you had with the court. A. Well, I volunteered in the Mexican Army.

Q. Now, I am going to show you that piece of paper which has been here introduced as an exhibit, it being Defendant's Exhibit F for identification, and ask you what that piece of paper is? A. (No answer.)

Q. Did you receive it? A. I did.

Q. And when did you receive it? A. The day I volunteer.

Q. From whom did you receive it? A. From—well, the military officer.

Q. From a military officer? A. Yes.

Miss Zacsek: I now move to introduce that into evidence, your Honor.

Mr. Haughton: Objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: The objection will be sustained. I am still taking the position I took this morning, that he cannot go across the line to Mexico and offer to volunteer into the Mexican Army and avoid the responsibility to this Government.

Miss Zacsek: And I am still taking the position of the treaty between the governments as being paramount to any opinion of counsel or court, unless we have the most authoritative voice on that subject, your Honor, and I say that with the utmost respect."

Regulation 633.91, promulgated under the Selective Service and Training Act of 1940, provides as follows:

"Induction and Subsequent Classification of Co-belligerent aliens:

(a) At any time prior to his induction into the land or naval forces of the United States, a registrant

who is not a citizen of the United States and who has not declared his intention to become a citizen of the United States, but who is a citizen or subject of a co-belligerent nation, may request and be permitted to be inducted into the Armed Forces of such co-belligerent nation, *provided an agreement has been entered into between the United States Government and the Government of such belligerent nation, the terms of which permit such induction and give to citizens or subjects of the United States residing in such co-belligerent nation a reciprocal right to serve in the land or naval forces of the United States.*

(b) The manner in which, the time when, and the place where, a request may be made by such registrant and the procedure to be followed in order for such registrant to be inducted into the Armed Forces of the co-belligerent nation of which he is a citizen or subject shall be prescribed by the Director of Selective Service."

It is submitted that the Director of Selective Service did not prescribe any rule or regulation setting up the machinery for the administration of Section (b) of Regulation 633.91, above set forth.

Appellant, a Mexican national, departed on October 30th, 1942, for Mexico, a co-belligerent nation. Thereafter, he volunteered for service in the Mexican Army by enlisting at Guadalajara.

It was the obvious intention of the respective governments of the United States and Mexico, by entering into the treaty of January 22, 1943, that their respective nationals be permitted to enter the army of their own country, even though residing in the other country. It is evident that under the existing statutes and regulations

of the Selective Training and Service Act, it would be difficult, if not almost impossible, for Mexican nationals residing in the United States, to return to Mexico to serve in the Mexican Army. Thus, the treaty mentioned herein was promulgated to serve the purposes for which it was intended. As appears in the text of the treaty, the official comment by His Excellency, Ezequiel Padilla, Minister of Foreign Relations, Mexico, D.F., shows that the two nations had determined to reach a satisfactory agreement which would co-incide with the excellent relations which happily bind the two Republics.

According to the United States Chargé d'Affiairs, as interem, Hon. Herbert S. Barclay, "it is the belief of the United States Government that this agreement adds further testimony to the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving the victory."

Since a treaty and an act of Congress are of equal dignity, it follows that an act of Congress may be repealed or superseded by a later treaty.

U. S. v. La Yen Tai, 22 S. Ct. 629; 185 U. S. 213.

Therefore, where the provision of an act of Congress and a subsequent treaty are conflicting, the latter will control.

Rubas v. U. S., 24 S. Ct. 727; 194 U. S. 315.

Treaties should ordinarily be construed liberally to give effect to the apparent or expressed intentions of the parties in order that justice may be done to citizens or subjects of the parties.

63 Corpus Juris 839.

A treaty, as a solemn international obligation or contract, should be faithfully observed by each of the con-

tracting parties; in other words, a treaty is to be executed in the utmost good faith, with a view to make effective the purposes of the high contracting parties.

63 Corpus Juris, 848.

Expulsion without trial of American citizen from Mexico is a violation of a treaty provision between these countries granting their special protection to the persons and property of the citizens of each other.

Otocha v. U. S., 8 Ct. Cl. 427.

Quoting from the treaty of January 22, 1943:

> "The procedure for the transportation and turning over of these persons will be agreed upon by appropriate authorities of the two countries who are empowered to bring about the objectives desired."

It is submitted further by appellant that careful search had revealed no such procedure was ever agreed upon or prescribed by the appropriate authorities of the two countries.

Thus, appellant, being a citizen of Mexico, and having declared that he did not intend to become a citizen of the United States, was not afforded the full measure of due process in that

1. The Director of Selective Service did not prescribe any rule or regulation for the administration of Section (b) of Regulation 633.91, Selective Training and Service Act of 1940.

2. Neither the Government of the United States, nor the Government of Mexico prescribed the procedure for the transportation and turning over of Mexican nationals in accordance with the provisions of the treaty of January 22, 1943, 57 U. S. Statutes at Large, 975, 78th Congress, 1st Session, 1943.

III.

The Court Erred in Refusing to Give the Following Instruction Proposed and Offered by Defendant, to Which Refusal the Defendant, Within the Time and in the Manner Prescribed by Law, Duly Excepted.

Defendant's Proposed Instruction No. 15. [R. 14, 15.]

If a delinquent reports or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted or assigned to work of national importance, as the case may be, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to work of national importance, and the local board to which the registrant has reported or before which he has been brought shall prepare such papers as may be necessary in order to effect such induction or assignment and forward copies thereof the registrant's own local board. The induction or assignment of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for

delivery to the local board from which such registrant was inducted or assigned.

(c) If the registrant's own local board advises that an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) has not been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared, or has been brought of the action to be taken with reference to such registrant.

Appellant's testimony shows that he contacted Eugene Cordeau, Sr., a member of Local Board No. 168 of National City, California in April, 1945. [R. 52, 53, 58, 59, 86, 122] for the purpose of returning to the United States and being inducted into the United States Army. That prior, and after such time, he made numerous efforts to return to the United States. [Government's Ex. 11, 12, 13; Deft. Ex. A, B.; R. 33, 51, 52, 53, 112, 113, 114, 116.]

It is appellant's contention that the regulation 642.41 of the Selective Service Act Regulations, provided a means for a delinquent who has failed to respond to an Order to Report for Induction, or an Order to Report for Work of National Importance, *to be delivered for induction* or steps taken to assign him to work of national importance.

When appellant reported to Eugene Cordeau, Sr., a member of the Selective Service Board No. 168, in April, 1945, the war with Germany was practically over, but the United States was still faced with the war in the Pacific. It was estimated by reputable military authorities that the possible American casualties would approximate

1,000,000 men in an invasion of Japan. In the face of this, the appellant clearly evidenced an intent to return to the United States and be admitted into the United States Army.

Under the existing regulations it was incumbent upon appellant's local board to take steps to effect the induction or assignment as the case may be. The Selective Training and Service Act was in full force and effect until March 31, 1947.

IV.

The Court Erred in Refusing to Allow a Written Offer of Proof To Be Admitted in Evidence, of the Testimony of Eugene Cordeau, Sr., a Material Witness, and To Be Submitted to the Jury.

At the opening of the proceedings of this case, on October 30, 1946, at 10:00 A.M. counsel for defendant made an oral statement to the Court [R. 19, 20], that Mr. Eugene Cordeau, Sr. (referred to as Mr. Jean Corteau), was a material witness upon whom the defense was predicated as the most essential witness; that said witness had been served personally; that a return of the subpoena had been duly filed; that the said witness had been present in court on all previous proceedings on this matter.

The Court thereupon stated [R. 21] that if necessary he would issue a bench warrant.

That counsel for defendant put in a long distance call to San Diego, and ascertained that Mr. Cordeau was ill in bed.

That on the following day, of the trial, October 31, 1946, counsel requested that a bench warrant be issued for the appearance of said material witness.

The proceedings were as follows [R. 175]:

"The Court: Counsel, you have filed a statement as to what you expect to prove by him.

Miss Zacsek: Yes.

The Court: I told you yesterday morning I would issue a bench warrant for the witness, but if we were to do so now it would simply mean a continuance of this case. You have filed a statement as to what you expect him to testify to?

Miss Zacsek: Yes.

The Court: And the court will direct that that statement be filed, because if he were here the court would not permit him to so testify, on the ground it would be incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

Miss Zacsek: Yes, your Honor.

The Court: And furthermore that it is simply corroborative of other testimony that has been introduced in this court. I do not feel it is necessary under these circumstances to order a continuance. The statement shows that he did not contact the defendant until the early part of 1946.

Miss Zacsek: '45, your Honor. If I put in '46 it is an error. I typed it myself in a state of great stupor and exhaustion last night.

The Court: And the statement is on my desk. I will file it with the clerk.

Miss Zacsek: I have my own copy. Just a moment, please. I beg the court's pardon, I ask leave to correct that. Having written it myself, I ask it be corrected to show April 1945 and not 1946.

The Court: All right, we will correct it and file it. The ruling still stands. Any further witnesses?"

The Constitution guarantees an accused in a criminal case the right to have the process of the court to compel the attendance of witnesses in his behalf.

Cal. Const. Art. I, Sec. 13.

This guaranty necessarily implies that a defendant be accorded a reasonable time to secure the attendance of his witnesses.

People v. Bossert, 14 Cal. App. 111.

That a continuance of the trial for that purpose be granted upon a proper showing.

People v. Fong Chung, 5 Cal. App. 587.

That upon a proper demand the compulsory process of the Court issue to secure the personal presence of witnesses, provided the testimony of such witness is material to defendant's case, and the witness is physically able to attend.

People v. Bossert, 14 Cal. App. 111;

People v. Marseiler, 70 Cal. 98;

People v. Saenz, 50 Cal. App. 383.

The testimony of Eugene Cordeau, Sr., was material in the following respects:

1. He was a member of Local Board No. 168, National City, California, and any communications between him and appellant's Local Board No. 199 in Los Angeles, or the Director of Selective Service, would come within the purview of Regulations Nos. 642.21, and 642.15.

2. That the testimony of this witness negatives the specific intent of evading service in the armed forces of the United States.

3. That it is corroborative of appellant's testimony.

4. That it is further a chain in the evidence showing the state of the appellant's mind.

5. That having acted as a liason officer between the United States and Mexico for approximately twenty-five years, this witness would be qualified as an expert in an interpretation of the administration of the treaty of January 22, 1943, between the United States and Mexico.

Wherefore, appellant prays for a reversal of the judgment.

Respectfully submitted,

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